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# O'CONNOR'S TEXAS RULES CIVIL TRIALS

BY  
MICHOLO O'CONNOR

2004 EDITORS  
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address of the clerk who issued the citation. TRCP 99(b)(3), (11).

2. Signature & seal. The citation must be signed by the clerk and issued under the seal of the court. TRCP 15, 99(b)(2); *Verlander Enters. v. Graham*, 932 S.W2d 259, 262 (Tex.App.—El Paso 1996, no writ).

CHAPTER 2. THE PLAINTIFF. LAWSUIT  
H. SERVING THE DEFENDANT WITH SUIT



**§2.4 Information about P.** The citation must contain the following information about the plaintiff:

1. **Identification of P.** The citation must contain the name of the plaintiff. TRCP 99(b)(7). If pro se, the citation must contain the plaintiff's address. TRCP 99(b)(9).

2. **P's lawyer.** The citation must contain the name and address of the plaintiff's lawyer. TRCP 99(b)(9).

**§2.5 Information about D.**

1. **Identification of D.**

(1) **Name.** The citation must contain the defendant's correct name. TRCP 99(b)(7); see *Amato v. Hernandez*, 981 S.W.2d 947, 949 (Tex.App.—Houston [1st Dist.] 1998, pet. denied). If the correct defendant was incorrectly named in the petition, the error is a misnomer, and a default judgment against that defendant will be affirmed if (1) the correct defendant was actually served, and (2) the petition describes the facts in such a way that the correct defendant knows it is the intended defendant. *Union Pac. Corp. v. Legg*, 49 S.W.3d 72, 78 (Tex.App.—Austin 2001, no pet.). If the wrong defendant was named in the petition, the error is a misidentification, and a default judgment must be reversed. See, e.g., *Union Pac.*, 49 S.W.3d at 78 (P named & served Union Pacific Railroad, not Union Pacific Corp.). See "Misnomer vs. misidentification," ch. 2-B, §3.3.1(2), p. 69.

(2) **Capacity.** When the defendant is sued in a representative capacity, the defendant must be identified in the petition by that capacity (e.g., trustee, executor). See, e.g., *Werner*, 909 S.W.2d at 870 (judgment could not be rendered against D as a trustee when she was sued only as an individual). See "Capacity," ch. 2-B, §3.2.2, p. 68.

(3) **Address for service.** The citation must include the defendant's address for service of process. When the defendant is a nonresident, the petition should use the exact language from the long-arm statute, TRCP 108, or other applicable statute to describe the place for service. The long-arm statute requires that the documents to be served on the Secretary of State (the petition and citation) must include a statement of the nonresident's name and home or home office address where the process is to be served. CPRC §17.045(a).

2. **Citation directed to D.** The citation must "be directed to the defendant." TRCP 99(b)(8); see, e.g., *Plains Chevrolet v. Thorne*, 656 S.W.2d 631, 633 (Tex.App.—Waco 1983, no writ) (service void because citation directed to G.M. Corporation, not Plains Chevrolet). TRCP 15, however, requires the process "to be directed to any sheriff or any constable within the State of Texas." The inclusion of directions to the sheriff or constable to serve the defendant does not invalidate the citation under TRCP 99(b)(8). See *Barker CATV Constr. v. Ampro, Inc.*, 989 S.W.2d 789, 792-93 (Tex.App.—Houston [1st Dist.] 1999, no pet.) (overruling other 1st court cases that held citation defective because it was directed to sheriff as well as D).

**§2.6 Identification of D's agent for service.** If the defendant must be served through an agent, the citation must name the agent for service and state the address for service on the agent. Even though an agent is to be served for the defendant, the citation must be directed to the defendant and not to the agent. See *Barker CATV*, 989 S.W.2d at 792. If the citation is directed to the agent, it does not confer jurisdiction over the defendant. *Dan Edge Motors v. Scott*, 657 S.W.2d 822, 823 (Tex.App.—Texarkana 1983, no writ); see, e.g., *Verlander Enters.*, 932 S.W.2d at 261 (citation was directed to a vice-president instead of the corporation). When the citation names one person as agent for service, but the return of the citation shows it was served on another person, the trial court does not acquire jurisdiction over the defendant. *Pharmakinetix Labs. v. Katz*, 717 S.W.2d 704, 706 (Tex.App.—San Antonio 1986, no writ).

1. **Corporation.** When the defendant is a corporation, the citation should be directed to the corporation and name as agent for service the president, any vice-president, or the registered agent. *Dan Edge Motors*, 657 S.W.2d at 823.

## COMMENTARIES

CHAPTER 2. THE PLAINTIFF'S LAWSUIT  
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2. **Partnership.** When the defendant is a partnership, the citation must be directed to the defendant-partnership and name the individual partners for service. CPRC §17.022; *ISO Prod. Mgmt. 1982 v. M&L Oil & Gas Expl.*, 768 S.W.2d 354, 356 (Tex.App.—Waco 1989, no writ).

§2.7 **Critical dates.** The citation must contain the following dates:

1. **Date petition filed.** The citation must state the date the plaintiff filed the petition. TRCP 99(b)(4). If the filing date of the plaintiff's petition is omitted, the defect is fatal. *Hance v. Cogswell*, 307 S.W.2d 277, 278-79 (Tex.App.—Austin 1957, no writ). If the citation states an impossible date for filing, the defect is fatal. *E.g., McGraw-Hill, Inc. v. Futrell*, 823 S.W.2d 414, 417 (Tex.App.—Houston [1st Dist.] 1992, writ denied) (date of service was 17 days before suit filed); *George v. Elledge*, 261 S.W.2d 201, 201 (Tex.App.—San Antonio 1953, no writ) (date of service was 7 months before suit filed).

2. **Date citation issued.** The citation must state the date it was issued. TRCP 15, 99(b)(5); *London v. Chandler*, 406 S.W.2d 203, 204 (Tex.1966). The date the citation is issued may be different from the date the clerk signs and seals the citation. *London*, 406 S.W.2d at 204. The citation is issued when it is sent forth from the clerk's office under the clerk's authority and given to an officer or other authorized person for service. *Id.* If the date the citation was issued is omitted, the citation can be amended. TRCP 118; *London*, 406 S.W.2d at 204.

3. **Time to answer.** The citation for district and county courts must state the defendant is required to file a written answer on or before 10:00 a.m. on the Monday next after the expiration of 20 days from the date of service. TRCP 15, 99(b), (c). This requirement must be stated in the exact language of TRCP 99(c). If the 20th day falls on a Monday, the answer must be filed by the next Monday. The citation for justice courts must make the same statement as the citation for district and county courts, but it has a shorter deadline—10 days. TRCP 534(b).

§2.8 **Warning of default.** The citation must notify the defendant that if it does not file an answer, judgment by default may be rendered for the relief demanded in the petition. TRCP 99(b)(12). This requirement must be stated in the exact language of TRCP 99(c).

§2.9 **Attachment of petition.** The plaintiff's original petition must be attached to the citation. See TRCP 99(a), 106. If the plaintiff amends the petition before service by adding parties, claims, or damages, the amended petition must be attached to the citation. See, *e.g., Primate Constr. v. Silver*, 884 S.W.2d 151, 152-53 (Tex.1994) (default judgment reversed because D served with original petition, which did not name it as D, instead of amended petition); *Seeley v. KCI USA, Inc.*, 100 S.W.3d 276, 277-78 (Tex.App.—San Antonio 2001, no pet.) (same). See "What was served," §9.2.2, p. 127; "Amending the petition," §10.1, p. 130.

### §3. WHO MAY SERVE PROCESS

The plaintiff should make sure that service is accomplished by a person who is authorized by rule, statute, or court order to serve process. Service of process by a person who is not authorized to accomplish service is invalid and will not support a default judgment.

§3.1 **Clerk of court.** The clerk of the court is authorized to serve process by registered or certified mail and to serve citation by publication. TRCP 103.

§3.2 **Authorized officer.** A sheriff, constable, or other person authorized by law may serve process in Texas. Local Gov't Code §85.021(a) (sheriff), §86.021(c) (constable); TRCP 103. Nothing in Local Gov't Code §85.021 limits sheriffs to serving process in their own counties. Under Local Gov't Code §86.021(c) and (d), however, constables are limited to serving process only in their own and contiguous counties.

§3.3 **Private process server.** A person who has no interest in the lawsuit, is at least 18 years old, and is authorized by a written court order may serve process. TRCP 103; see *Mayfield v. Dean Witter Fin. Servs.*, 894 S.W.2d 502, 505 (Tex.App.—Austin 1995, writ denied); *cf.* Ins. Code art. 1.36, §3(a) (service on insurance company). A plaintiff or member of its lawyer's staff cannot serve process. The process must include a copy of the court

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order that authorized the disinterested person to serve process; without it, the disinterested person cannot effectuate service. See, e.g., *HB & WM, Inc. v. Smith*, 802 S.W.2d 279, 281 (Tex.App.—San Antonio 1990, no writ) (no order authorizing commercial process server). The Secretary of State's office will not accept service of process from a private process server unless the process includes a copy of the order appointing the server.

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§3.4 Not interested person. No person who is a party or who is interested in the outcome of the suit may serve process. TRCP 103.

#### §4. METHODS OF SERVICE

Service of process is accomplished by providing the person or entity to be served with a copy of both the citation and the petition. See TRCP 99(a). If a defendant cannot be served by one of the methods below, and it does not waive service, it may not be subject to service of process regardless of it having minimum contacts with the forum. If the citation restricts service to a particular method, service must be made according to the citation's terms. See, e.g., *Smith v. Commercial Equip. Leasing Co.*, 678 S.W.2d 917, 917-18 (Tex.1984) (service invalid because citation was restricted to personal service & process was served by certified mail). Process may be served on the defendant according to any of the following methods.

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#### NOTE

*A citation cannot be served on Sunday, except in cases of injunction, attachment, garnishment, sequestration, or distress proceedings. TRCP 6; Nichols v. Nichols, 857 S.W.2d 657, 659 (Tex.App.—Houston [1st Dist.] 1993, no writ).*

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§4.1 Service by U.S. Mail. Service by certified mail, return receipt requested is the most popular method of serving most defendants. It is much less expensive and time-consuming than any other method of service. Service by certified mail may be made by (1) the clerk of the court, (2) the sheriff or constable or any other person authorized by law, or (3) any person 18 years of age or older, authorized by law or by order of court. TRCP 103, 106(a)(2); *P&H Transp. v. Robinson*, 930 S.W.2d 857, 859 (Tex.App.—Houston [1st Dist.] 1996, writ denied) (authorized private process server can serve by mail); cf. Gov't Code §28.013(c) (service in small claims courts). Under CPRC §17.026(a), the clerk of the court, or a party or its representative, may serve process on the Secretary of State by certified mail, return receipt requested.

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§4.2 Service by personal delivery. Any person who has the authority to serve process (by law or court order) may serve the defendant by delivering the process to the defendant personally. TRCP 106(a)(1); see *Woodall v. Lansford*, 254 S.W.2d 540, 541 (Tex.App.—Fort Worth 1953, no writ). When the authorized person hands the citation to the defendant, the defendant must understand that it is a lawsuit and that the defendant is being served. See *Texas Indus. v. Sanchez*, 521 S.W.2d 133, 135-36 (Tex.App.—Dallas 1975), writ *ref'd n.r.e.*, 525 S.W.2d 870 (Tex. 1975).

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§4.3 Service by court order. If personal service or service by mail was attempted but was unsuccessful, the court may authorize another method of service. TRCP 106(b); *State Farm Fire & Cas. Co. v. Costley*, 868 S.W.2d 298, 299 (Tex.1993); *Rivers v. Viskoski*, 967 S.W.2d 868, 870 (Tex.App.—Eastland 1998, no pet.). When a court orders substituted service under TRCP 106, the only authority for the service is the order itself. *Dolly v. Aethos Comm. Sys.*, 10 S.W.3d 384, 388 (Tex.App.—Dallas 2000, no pet.). Due process is the minimum requirement for alternative service.

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1. Motion & affidavit. The plaintiff must file a motion for substituted service supported by an affidavit describing the unsuccessful attempts at service under TRCP 106(a)(1) or (a)(2), and stating a place where the defendant can probably be found (e.g., usual place of residence or business). TRCP 106(b); *Costley*, 868 S.W.2d at 299; e.g., *Lewis v. Ramirez*, 49 S.W.3d 561, 565 (Tex.App.—Corpus Christi 2001, no pet.) (affidavit lacked the necessary specificity because it only said service on D attempted "on several occasions"). If the plaintiff does not file

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an affidavit verifying the unsuccessful efforts to serve the defendant, the trial court cannot order substitute service. *Wilson v. Dunn*, 800 S.W.2d 833, 836 (Tex.1990). A party need show only that attempts failed under either TRCP 106(a)(1) or (a)(2). *Costley*, 868 S.W.2d at 299 n.2.

**2. Types of service.** Under TRCP 106(b), the following types of service are permissible:

(1) Delivery of process to any authorized person over 16 years of age at the location of the defendant's usual place of residence or business, or any other place where the defendant may be found, as stated in the affidavit. TRCP 106(b)(1); *Walker v. Brodhead*, 828 S.W.2d 278, 280 (Tex.App.—Austin 1992, writ denied); see *Olympia Marble & Granite v. Mayes*, 17 S.W.3d 437, 444-45 (Tex.App.—Houston [1st Dist.] 2000, no pet.).

(2) Service of process in any other manner that the affidavit or other evidence shows will be reasonably effective to give the defendant notice of the suit. TRCP 106(b)(2); *Costley*, 868 S.W.2d at 299 (first-class mail service); see, e.g., *Dolly*, 10 S.W.3d at 388-89 (posting copy on D's front door).

**§4.4 Service by publication.** Citation by publication is authorized for use in actions against a defendant whose residence is unknown (TRCP 109), against unknown heirs or stockholders of defunct corporations (TRCP 111), against unknown owners or claimants of an interest in land (TRCP 112), or for delinquent ad valorem taxes (TRCP 117a). Citation by publication also may be authorized by order of the court under TRCP 106(b)(2). The form of citation and technicalities of service are set out in TRCP 114-117. See, e.g., *Wiebusch v. Wiebusch*, 636 S.W.2d 540, 542 (Tex.App.—San Antonio 1982, no writ) (notice of nature of suit is necessary for service by publication); see also *Wood v. Brown*, 819 S.W.2d 799, 800 (Tex.1991) (attorney's affidavit did not satisfy TRCP 109). Service by publication is not favored because it is unlikely to provide the defendant with notice of suit. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 315, 70 S.Ct. 652, 658 (1950). A defendant served by publication who does not answer or appear must be represented by an attorney appointed by the court. TRCP 244. A defendant served by publication can challenge a motion for default judgment by a motion for new trial up to two years after the judgment. TRCP 329(a). See "MNT After Service by Publication" ch. 10-B, §16, p. 634.

**§5. SERVICE ON SECRETARY OF STATE**

Thirty-eight separate statutory provisions designate the Secretary of State as an agent for service of process. For the list of the statutes, see [www.sos.state.tx.us/statdoc/forms/2401.pdf](http://www.sos.state.tx.us/statdoc/forms/2401.pdf). The two most important of these involve service on a nonresident and service on a corporation. See "Long-arm service," §5.3, p. 124; "Service on corporation," §5.4, p. 124. Some of the other statutes include CPRC §101.102(c) (Tort Claims Act), CPRC §17.091 (nonresident in a delinquent tax case); Insurance Code article 1.36, §8(d) & (e) and article 21.21, §19(b) (insurance company); and Probate Code §105A(b) (foreign corporate fiduciary). For information about serving the Secretary of State, call the Citations Unit at (512) 463-5560.

**§5.1 General rules.** When serving the Secretary of State with process, the plaintiff should consult the specific statutes and observe the following general rules:

**1. Service on Secretary.** The plaintiff may accomplish service on the Secretary of State by certified mail, CPRC §17.026(a) (sent by clerk or party); by delivery by a qualified officer or a private process server; or by any other means permitted by rule or statute. Personal service on the Secretary of State is not necessary. See *Capitol Brick v. Fleming Mfg. Co.*, 722 S.W.2d 399, 401 (Tex.1986) (service under long-arm statute). Two copies of the process must be served on the Secretary of State. 1 Tex.Admin. Code §71.21(a). When process is served by a sheriff or constable, the plaintiff must include an additional copy of the process for the return. When process is served by a private process server, the plaintiff must include copies of the order appointing the process server. When process is served by mail, the citation should be sent to the Secretary of State's post office address; when process is served by delivery, it should be sent to the street address of the Citations Unit.

**2. Necessary information.** The citation must contain the following information: (1) the identity of the statute authorizing service, (2) the defendant's name, (3) the defendant's address for service, and (4) when

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# TEXAS RULES OF COURT

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## Rule 98

## RULES OF CIVIL PROCEDURE

## SECTION 5. CITATION

## Rule

99. Issuance and Form of Citation.  
 100 to 102. Repealed.  
 103. Who May Serve.  
 104. Repealed.  
 105. Duty of Officer or Person Receiving.  
 106. Method of Service.  
 107. Return of Service.  
 108. Defendant Without State.  
 108a. Service of Process in Foreign Countries.  
 109. Citation by Publication.  
 109a. Other Substituted Service.  
 110. Effect of Rules on Other Statutes.  
 111. Citation by Publication in Action Against Unknown Heirs or Stockholders of Defunct Corporations.  
 112. Parties to Actions Against Unknown Owners or Claimants of Interest in Land.

## Rule

113. Citation by Publication in Actions Against Unknown Owners or Claimants of Interest in Land.  
 114. Citation by Publication; Requisites.  
 115. Form of Published Citation in Actions Involving Land.  
 116. Service of Citation by Publication.  
 117. Return of Citation by Publication.  
 117a. Citation in Suits for Delinquent Ad Valorem Taxes.  
 118. Amendment.  
 119. Acceptance of Service.  
 119a. Copy of Decree.  
 120. Entering Appearance.  
 120a. Special Appearance.  
 121. Answer is Appearance.  
 122. Constructive Appearance.  
 123. Reversal of Judgment.  
 124. No Judgment Without Service.

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## Rule 99. Issuance and Form of Citation

a. **Issuance.** Upon the filing of the petition, the clerk, when requested, shall forthwith issue a citation and deliver the citation as directed by the requesting party. The party requesting citation shall be responsible for obtaining service of the citation and a copy of the petition. Upon request, separate or additional citations shall be issued by the clerk.

b. **Form.** The citation shall (1) be styled "The State of Texas," (2) be signed by the clerk under seal of court, (3) contain name and location of the court, (4) show date of filing of the petition, (5) show date of issuance of citation, (6) show file number, (7) show names of parties, (8) be directed to the defendant, (9) show the name and address of attorney for plaintiff, otherwise the address of plaintiff, (10) contain the time within which these rules require the defendant to file a written answer with the clerk who issued citation, (11) contain address of the clerk, and (12) shall notify the defendant that in case of failure of defendant to file an answer, judgment by default may be rendered for the relief demanded in the petition. The citation shall direct the defendant to file a written answer to the plaintiff's petition on or before 10:00 a.m. on the Monday next after the expiration of twenty days after the date of service thereof. The requirement of subsections 10 and 12 of this section shall be in the form set forth in section c of this rule.

c. **Notice.** The citation shall include the following notice to the defendant: "You have been sued. You may employ an attorney. If you or your attorney do not file a written answer with the clerk who issued this citation by 10:00 a.m. on the Monday next following the expiration of twenty days after you were

served this citation and petition, a default judgment may be taken against you."

d. **Copies.** The party filing any pleading upon which citation is to be issued and served shall furnish the clerk with a sufficient number of copies thereof for use in serving the parties to be served, and when copies are so furnished the clerk shall make no charge for the copies.

Oct. 29, 1940, eff. Sept. 1, 1941. Amended by orders of Oct. 10, 1946, eff. Feb. 1, 1948; July 15, 1987, eff. Jan. 1, 1988.

## Opinions of Subcommittee on Interpretation of Rules

The amendment effective February 1, 1946 enables one defendant to demand issuance of citations for other defendants. 8 Texas B.J. 406 (1945).

## Historical Notes

## Source

Vernon's Ann.Civ.St. art. 2021, modified to authorize clerk to issue as many citations as plaintiff requests, without delay of securing a return on any prior citation.

## Rules 100 to 102. Repealed by Order of July 15, 1987, eff. Jan. 1, 1988

## Historical Notes

Former Rules 100 to 102, which related to other process, requisites of the citation, and territorial limits of effective service, were added by order of Oct. 29, 1940.

## Rule 103. Who May Serve

[Text of rule effective July 1, 2005.]

Process—including citation and other notices, writs, orders, and other papers issued by the court—may be served anywhere by (1) any sheriff or constable or other person authorized by law, (2) any person author-

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ized by law or by written order of the court who is not less than eighteen years of age, or (3) any person certified under order of the Supreme Court. Service by registered or certified mail and citation by publication must, if requested, be made by the clerk of the court in which the case is pending. But no person who is a party to or interested in the outcome of a suit may serve any process. The order authorizing a person to serve process may be made without written motion and no fee may be imposed for issuance of such order.

Oct. 29, 1940, eff. Sept. 1, 1941. Amended by orders of June 10, 1980, eff. Jan. 1, 1981; July 18, 1987, eff. Jan. 1, 1988; Oct. 7, 2004, eff. July 1, 2005.

[For text of rule effective until July 1, 2005, see Historical Notes, post.]

#### Comment—1988

The amendment makes clear that the courts are permitted to authorize persons other than Sheriffs or Constables to serve Citation. Further, Sheriffs or Constables are not restricted to service in their county. The last sentence is added to avoid the necessity of motions and fees.

#### Comment—2005

The rule is amended to clarify that it applies to service of all process and to include among the persons authorized to affect service those who meet certification requirements promulgated by the Supreme Court.

#### Comment—2005

1. To be certified to serve process under Rules 103 and 536(a), Texas Rules of Civil Procedure, a person must file with the Clerk of the Supreme Court a sworn application in the form prescribed by the Court. The application must contain a statement that the applicant has not been convicted of a felony or of a misdemeanor involving moral turpitude. Form applications may be obtained in the Clerk's office or on the Supreme Court website. The application must include a criminal history record obtained within the preceding 90 days from the Texas Department of Public Safety in Austin, Texas, and a certificate from the director of a civil process service course approved as provided by this Order that the applicant has completed the approved course within the prior year.

2. Applications will be reviewed and approved or rejected for good cause by the Texas Process Service Review Board, appointed by the Court. The Board will notify each applicant of its action, and for each person certified, will post on a list maintained on the Supreme Court website the person's name and an assigned identification number. The Office of Court Administration will provide clerical assistance to the Board.

3. Certification is effective for three years from the last day of the month it issues.

4. Certification may be revoked for good cause, including a conviction of a felony or of a misdemeanor involving moral turpitude. A person sub-

fering such a conviction must immediately notify the Clerk of the Supreme Court and cease to serve process.

5. A person must not represent that he or she is certified under this Order if certification has not been approved, has expired, or has been revoked.

6. The following civil process service courses are approved:

a. the course now offered by the Houston Young Lawyer's Association, for certification for every state court;

b. the course now offered by the Texas Process Server's Association, for certification except for courts in Harris County.

7. A civil process service course that meets the following requirements, similar to the courses approved in paragraph 6, may apply to the Board for approval by the Court:

a. a minimum of 7 hours of monitored instruction;

b. instruction on applicable laws, including the historical development of the law, with emphasis on practical training of proper service and return of service (for example, using sample returns depicting both correct and incorrect returns of service);

c. instruction on a process server's exposure to criminal liability;

d. instruction on unique issues involving family law cases; and

e. basic competence testing upon completion of the course.

8. No organization that offers an approved civil process service course may make membership in the organization a prerequisite to taking the course.

9. The effective date of this Order is February 1, 2005.\* A person who on that date is shown to have met the requirements for an approved private process server already in place in Dallas County, Denton County, or Harris County, having provided a criminal history record there and having completed a course listed in paragraph 6, is considered to have been certified under this Order, to the extent permitted by paragraph 6, as if the person had complied with this Order on that date.

\* An order dated Jan. 27, 2005 extended the effective date to July 1, 2005.

#### Historical Notes

##### 2005 Amendment

Rewrote the section, which prior thereto read:

"Citation and other notices may be served anywhere by (1) any sheriff or constable or other person authorized by law or, (2) by any person authorized by law or by written order of the court who is not less than eighteen years of age. No person who is a party to or interested in the outcome of a suit shall serve any process. Service by registered or certified mail and citation by publication shall, if requested, be made by the clerk of the court in which the case is pending. The order authorizing a person to serve process may be made without written motion and no fee shall be imposed for issuance of such order."

An order dated Jan. 27, 2005 order provided:



## Rule 103

## RULES OF CIVIL PROCEDURE

The period for public comment on proposed amendments to Rules 103 and 536(a) of the Texas Rules of Civil Procedure, as set out in the Order dated October 7, 2004, in Misc. Docket No. 04-9224, is extended to June 15, 2005, to allow full consideration of the large number of comments already received and of the effect of any legislation that would impact the amendments.

"The effective date of the amendments, with any changes made after public comments are received, is extended from February 1, 2005, to July 1, 2005.

"Comments appended to these rules are intended to inform their construction and application."

Source

New rule.

### Rule 104. Repealed by order of July 15, 1987, eff. Jan. 1, 1988

#### Historical Notes

Former Rule 104, which related to situations where there is no officer qualified to serve process, was added by order of Oct. 29, 1940.

See, now, Rule 103.

### Rule 105. Duty of Officer or Person Receiving

The officer or authorized person to whom process is delivered shall endorse thereon the day and hour on which he received it, and shall execute and return the same without delay.

Oct. 29, 1940, eff. Sept. 1, 1941. Amended by orders of July 11, 1978, eff. Jan. 1, 1978; July 15, 1987, eff. Jan. 1, 1988.

#### Historical Notes

Source

Vernon's Ann.Civ.St. art. 2025, unchanged.

### Rule 106. Method of Service

(a) Unless the citation or an order of the court otherwise directs, the citation shall be served by any person authorized by Rule 103 by

(1) delivering to the defendant, in person, a true copy of the citation with the date of delivery endorsed thereon with a copy of the petition attached thereto, or

(2) mailing to the defendant by registered or certified mail, return receipt requested, a true copy of the citation with a copy of the petition attached thereto.

(b) Upon motion supported by affidavit stating the location of the defendant's usual place of business or usual place of abode or other place where the defendant can probably be found and stating specifically the facts showing that service has been attempted under either (a)(1) or (a)(2) at the location named in such affidavit but has not been successful, the court may authorize service

(1) by leaving a true copy of the citation, with a copy of the petition attached, with anyone over

sixteen years of age at the location specified in such affidavit, or

(2) in any other manner that the affidavit or other evidence before the court shows will be reasonably effective to give the defendant notice of the suit.

Oct. 29, 1940, eff. Sept. 1, 1941. Amended by orders of Aug. 18, 1947, eff. Dec. 31, 1947; July 22, 1978, eff. Jan. 1, 1978; July 11, 1977, eff. Jan. 1, 1978; June 10, 1980, eff. Jan. 1, 1981; July 15, 1987, eff. Jan. 1, 1988; April 24, 1990, eff. Sept. 1, 1990.

#### Comment—1988

Conforms to amendment to Rule 103.

#### Opinions of Subcommittee on Interpretation of Rules

##### Endorsement of delivery date

The failure of the officer serving a citation to endorse the date of delivery upon the copy of the citation delivered to the defendant does not affect the jurisdiction of the trial court to render a default judgment, but if the defendant seasonably moves to set aside the default judgment and shows that he was in fact injured or misled by the officer's failure to endorse the date of service upon the copy the trial court should set aside the default and give the defendant an opportunity to appear and have a trial on the merits. 6 Texas B.J. 20 (1943); 8 Texas B.J. 80 (1945).

In view of the fact that Rule 107 requires the return to show "the manner of service" the return should show that the date of delivery was endorsed on the copy of the citation or notice in accordance with Rule 106, 5 Texas B.J. 168 (1942); 8 Texas B.J. 18 (1945).

#### Federal Rules

Federal Rule 4(d)(1) provides for service upon an individual other than an infant or an incompetent by leaving copies of the summons and complaint "at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein", as an alternative to personal service.

#### Historical Notes

Source

Vernon's Ann.Civ.St. art. 2026, modified to require endorsement of date of delivery, and by deleting requirement that copy of petition be certified.

### Rule 107. Return of Service

The return of the officer or authorized person executing the citation shall be endorsed on or attached to the same; it shall state when the citation was served and the manner of service and be signed by the officer officially or by the authorized person. The return of citation by an authorized person shall be verified. When the citation was served by registered or certified mail as authorized by Rule 106, the return by the officer or authorized person must also contain the return receipt with the addressee's signature. When

the officer or authorized person, the return of the officer or authorized person and the cause of the defendant is to be

Where citation is as authorized by made in the manner

No default judgment until the citation, with proof of service. Rules 108 or 108s event citation is been on file with exclusive of the date. Oct. 29, 1940, eff. Sept. 1, 1941; Jan. 1, 1978; June 10, 1980; April 24,

Amendment to Rule 103.

To state may can be obtained served with process to the provision

#### Opinion

In Acceptance of

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Citations by

Rule 107 shall be granted the officer's return with the clerk of the filing apply to a citation of a citation 114-117. The citation is the absence of prescribed time to defend the attorney can which is fixed make his return but the court has been put executive week 28 days before

the location specified in such manner that the affidavit of the court shows will be ready to the defendant notice of the

Amended by orders of Aug. 18, 1900, 5, eff. Jan. 1, 1976; July 11, 1977, eff. Jan. 1, 1981; July 15, 1987, eff. Jan. 1, 1990.

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Subcommittee on  
Interpretation of Rules  
Effective Date

Officer serving a citation to appear upon the copy of the citation does not affect the trial court to render a default judgment and shows injured or misled by the return the date of service upon should set aside the default judgment an opportunity to appear on the merits. 6 Texas B.J. 20 (1945).

that Rule 107 requires the return of delivery was endorsed on or notice in accordance with B.J. 168 (1942); 8 Texas

Interpretation of Rules

provides for service upon an infant or an incompetent of the summons and complaint or usual place of residence of suitable age and discretion, as an alternative to

Interpretation of Rules

2026, modified to require a return, and by deleting requirements.

Interpretation of Rules

Officer or authorized person may endorse on or attached to the citation was served and be signed by the officer or authorized person. The return of the officer or authorized person shall be verified by registered or certified mail. Rule 106, the return by the officer or authorized person must also contain the addressee's signature. When

the officer or authorized person has not served the citation, the return shall show the diligence used by the officer or authorized person to execute the same and the cause of failure to execute it, and where the defendant is to be found, if he can ascertain.

Where citation is executed by an alternative method as authorized by Rule 106, proof of service shall be made in the manner ordered by the court.

No default judgment shall be granted in any cause until the citation, or process under Rules 108 or 108a, with proof of service as provided by this rule or by Rules 108 or 108a, or as ordered by the court in the event citation is executed under Rule 106, shall have been on file with the clerk of the court ten days, exclusive of the day of filing and the day of judgment. Oct. 29, 1940, eff. Sept. 1, 1941. Amended by orders of July 11, 1977, eff. Jan. 1, 1978; June 10, 1980, eff. Jan. 1, 1981; July 15, 1987, eff. Jan. 1, 1988; April 24, 1990, eff. Sept. 1, 1990.

Comment—1988

Amendments are made to conform to changes in Rule 103.

Comment—1990

To state more directly that a default judgment can be obtained when the defendant has been served with process in a foreign country pursuant to the provisions of Rules 108 or 108a.

### Opinions of Subcommittee on Interpretation of Rules

#### Acceptance of service

Where the defendant accepts service in a divorce case this rule pertaining to the time for which an officer's return shall lie on file before default judgment is not applicable and therefore, insofar as this case is concerned, the case may be heard after the expiration of thirty days after suit is filed whether such acceptance of service has been on file ten days as required by this rule or not. 7 Texas B.J. 14 (1944); 8 Texas B.J. 39 (1945).

#### Citations by publication

Rule 107 providing that no default judgment shall be granted in any cause until the citation with the officer's return thereon shall have been on file with the clerk of the court for ten days, exclusive of the filing and the day of judgment does not apply to a citation by publication. The requisites of a citation by publication are prescribed by Rules 114-117. There can be no default judgment when the citation is by publication, but under Rule 244 in the absence of an answer or appearance within the prescribed time the court must appoint an attorney to defend the suit in behalf of the defendant. No attorney can be appointed until appearance day which is fixed by Rule 114. The sheriff should make his return promptly after the last publication but the court should make certain that the citation has been published once each week for four consecutive weeks, the first publication to be at least 28 days before the return day of the citation,

before appointing an attorney to represent the defendant. 6 Texas B.J. 20 (1943); 8 Texas B.J. 31 (1945).

The prohibition against default judgment until the citation with the officer's return thereon shall have been on file with the clerk ten days before the default is taken does not apply where a citation has been obtained through publication. 7 Texas B.J. 45 (1944); 8 Texas B.J. 43 (1945).

#### Endorsement of delivery date

The failure of the officer serving a citation to endorse the date of delivery upon the copy of the citation delivered to the defendant does not affect the jurisdiction of the trial court to render a default judgment, [Accord, A. J. Hill Co. v. Textan of Yoakum, Civ.App.1951, 235 S.W.2d 945, error dismissed.] but if the defendant seasonably moves to set aside the default judgment and shows that he was in fact injured or misled by the officer's failure to endorse the date of service upon the copy the trial court should set aside the judgment and give the defendant an opportunity to appear and have a trial on the merits. 6 Texas B.J. 20 (1943); 8 Texas B.J. 30 (1945).

In view of the fact that Rule 107 requires the return to show "the manner of service" the return should show that the date of delivery was endorsed on the copy of the citation or notice in accordance with Rule 106. 5 Texas B.J. 168 (1942); 8 Texas B.J. 13 (1945).

#### Waiver of citation

Waiver of citation under Rule 119 contemplates that no citation is issued and consequently that the sheriff makes no return. It involves the signing of a paper under oath and the filing of the paper in the cause. Consequently Rule 107 pertaining to the time for which an officer's return shall lie on file before default judgment does not apply in a case where service is accepted. 7 Texas B.J. 14 (1944); 8 Texas B.J. 39 (1945). See also 5 Texas B.J. 465 (1942); 8 Texas B.J. 29 (1945).

#### Divorce cases

Where the defendant accepts service in a divorce case this rule pertaining to the time for which an officer's return shall lie on file before default judgment is not applicable and therefore, insofar as this rule is concerned, the case may be heard after the expiration of thirty days after suit is filed whether such acceptance of service has been on file ten days as required by this rule or not. 7 Texas B.J. 14 (1944); 8 Texas B.J. 39 (1945).

#### Copy of plaintiff's petition

It is the opinion of the subcommittee "that the copy of the plaintiff's petition is not a part of the citation, or notice to serve non-residents, and it is not, therefore, necessary that a copy of such petition be attached to the citation upon which the sheriff makes his return and files in the court."

"The purpose of the provision that the citation should be accompanied by a copy of the plaintiff's petition is to give the defendant notice, at the time of service, of the nature of the plaintiff's demands. This purpose is accomplished when a copy of the plaintiff's petition is served on the defendant, and

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#### mmittee on of Rules

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Rule 753 the court would have the discretion to determine whether a default judgment should be granted under the circumstances and whether in-justice would result from the granting of a default; in such case the court should make inquiry as to why defendant failed to appear. 9 Texas B.J. 92 (1946).

#### Historical Notes

##### Source

Vernon's Ann.Civ.St. art. 2047, unchanged.

#### Rule 122. Constructive Appearance

If the citation or service thereof is quashed on motion of the defendant, such defendant shall be deemed to have entered his appearance at ten o'clock a. m. on the Monday next after the expiration of twenty (20) days after the day on which the citation or service is quashed, and such defendant shall be deemed to have been duly served so as to require him to appear and answer at that time, and if he fails to do so, judgment by default may be rendered against him. Oct. 29, 1940, eff. Sept. 1, 1941.

#### Opinions of Subcommittee on Interpretation of Rules

##### Forcible entry and detainer

Where in a forcible detainer proceeding, the citation was addressed to the sheriff or constable instead of the defendant and upon motion of the defendant, the citation was quashed, as against a contention on one hand that this is a special proceeding returnable at a special term of the justice court and a new citation is necessary; and on the other hand that there has been a constructive appearance by virtue of Rule 122, the subcommittee was of the opinion that the quashal would be an appearance and that at the time mentioned in Rule 122, if the justice court was then in session and, if not, at the succeeding term of such court, the

cause should proceed against the defendant. 5 Texas B.J. 428 (1942); 8 Texas B.J. 27 (1945).

#### Historical Notes

##### Source

Vernon's Ann.Civ.St. art. 2093, § 8, applicable to certain districts, unchanged. The former general statute, Art. 2048, was repealed.

#### Rule 123. Reversal of Judgment

Where the judgment is reversed on appeal or writ of error for the want of service, or because of defective service of process, no new citation shall be issued or served, but the defendant shall be presumed to have entered his appearance to the term of the court at which the mandate shall be filed.

Oct. 29, 1940, eff. Sept. 1, 1941.

#### Historical Notes

##### Source

Vernon's Ann.Civ.St. art. 2049, with minor textual change.

#### Rule 124. No Judgment Without Service

In no case shall judgment be rendered against any defendant unless upon service, or acceptance or waiver of process, or upon an appearance by the defendant, as prescribed in these rules, except where otherwise expressly provided by law or these rules.

When a party asserts a counterclaim or a cross-claim against another party who has entered an appearance, the claim may be served in any manner prescribed for service of citation or as provided in Rule 21(a).

Oct. 29, 1940, eff. Sept. 1, 1941. Amended by order of Dec. 5, 1982, eff. April 1, 1984.

#### Historical Notes

##### Source

Vernon's Ann.Civ.St. art. 2050, with minor textual change.

## SECTION 6. COSTS AND SECURITY THEREFOR

#### Rule

- 125. Parties Responsible.
- 126. Fee for Execution of Process, Demand.
- 127. Parties Liable for Other Costs.
- 128. Repealed.
- 129. How Costs Collected.
- 130. Officer to Levy.
- 131. Successful Party to Recover.
- 132. Repealed.
- 133. Costs of Motion.
- 134, 135. Repealed.
- 136. Demand Reduced by Payments.
- 137. In Assault and Battery, etc.
- 138. Cost of New Trials.

#### Rule

- 129. On Appeal and Certiorari.
- 140. No Fee for Copy.
- 141. Court May Otherwise Adjudge Costs.
- 142. Security for Costs.
- 143. Rule for Costs.
- 143a. Costs on Appeal to County Court.
- 144. Judgment on Cost Bond.
- 145. Affidavit of Inability.
- 146. Deposit for Costs.
- 147. Applies to Any Party.
- 148. Secured by Other Bond.
- 149. Execution for Costs.



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7 Saipan, MP 96950  
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9 Fax: 664-2349

10 Attorneys for Defendant  
11 D. DOUGLAS COTTON

12  
13 IN THE UNITED STATES DISTRICT COURT  
14 FOR THE NORTHERN MARIANA ISLANDS  
15

16 ROBERT D. BRADSHAW,

17 Plaintiff,

18 v.

19 COMMONWEALTH OF THE NORTHERN  
20 MARIANA ISLANDS, NICOLE C. FORELLI,  
21 WILLIAM C. BUSH, D. DOUGLAS COTTON,  
22 L. DAVID SOSEBEE, ANDREW CLAYTON,  
23 UNKNOWN AND UNNAMED PERSONS IN  
24 THE CNMI OFFICE OF THE ATTORNEY  
25 GENERAL, ALEXANDRO C. CASTRO,  
26 JOHN A. MANGLONA, TIMOTHY H.  
BELLAS, PAMELA S. BROWN, ROBERT A.  
BISOM, AND JAY H. SORENSEN,

Defendants.

Case No. CV 05-0027

DECLARATION OF  
D. DOUGLAS COTTON

HEARING: December 22, 2005

TIME: \_\_\_\_:00 a.m.



## COMMENTARIES

CHAPTER 2. THE PLAINTIFF'S LAWSUIT  
H. SERVING THE DEFENDANT WITH SUIT

statute. CPRC §15.062(a). When the original defendant joins a third-party defendant, venue for the main action establishes venue for any claim by the plaintiff against that third-party defendant arising out of the same transaction, occurrence, or series of transactions or occurrences. *Id.* §15.062(b).

## H. SERVING THE DEFENDANT WITH SUIT

## §1. GENERAL

§1.1 Rules. TRCP 15-17, 99, 103, 105-108, 108a, 109a, 118-119, 119a, 120, 120a, 121-124, 237. See CPRC ch. 17; Business Corp. Act arts. 2.11, 8.10.

§1.2 Purpose. Service of citation is a term that describes the formal process by which a plaintiff gives a defendant notice that it has been sued. *Texas Nat. Res. Conserv. Comm'n v. Sierra Club*, 70 S.W.3d 809, 813 (Tex.2002). The purpose of the citation is to give the court jurisdiction over the defendant, to satisfy due process requirements, and to give the defendant the opportunity to appear and defend. *Cockrell v. Esteves*, 737 S.W.2d 138, 140 (Tex.App.—San Antonio 1987, no writ). A judgment cannot be rendered against a defendant unless the defendant was served with process, accepted or waived service, or entered an appearance. TRCP 124; *Werner v. Colwell*, 909 S.W.2d 866, 869-70 (Tex.1995); *Mapco, Inc. v. Carter*, 817 S.W.2d 686, 687 (Tex.1991). The citation and a copy of the plaintiff's petition, which is attached, are collectively referred to as the "process." Service of process is accomplished when the citation and a copy of the petition are delivered to the defendant, or the defendant is given notice of the suit through some other authorized means.

The rules concerning the issuance of citation, service of process, and the return of process are especially important when the court renders a default judgment. Because the ordinary presumptions of valid service do not apply in an appeal of a no-answer default judgment, the judgment will be reversed unless there is strict compliance with the rules. *Primate Constr. v. Silver*, 884 S.W.2d 151, 152 (Tex.1994). See "Sufficiency of the service," ch. 7-A, §3.4, p. 445.

§1.3 Forms & timetables. *O'Connor's Texas Civil Forms*, FORMS 2H; Timetables, this book, Pretrial Motions, p. 998, Default Judgment, p. 1007.

§1.4 Other references. Miller, *Misnomer: Default Judgments & Strict Compliance with Service of Process Rules*, 46 Baylor L.Rev. 633 (1994); Anderson, *Transnational Litigation Involving Mexican Parties*, 25 St. Mary's L.J. 1059 (1994).

## §2. REQUIREMENTS FOR THE CITATION

The citation must comply with TRCP 15 and 99. The citation is issued by the clerk of the court upon payment of a fee.

§2.1 Style of process. The style of the process must be "The State of Texas." TRCP 15, 99(b)(1). The process must be directed to any sheriff or any constable within the State of Texas. TRCP 15.

§2.2 Information about suit. The citation must identify the suit by showing the cause number. TRCP 99(b)(6) (called "file" number). If the citation omits the cause number or contains the wrong number, the citation is fatally defective. *Martinez v. Wilber*, 810 S.W.2d 461, 463 (Tex.App.—San Antonio 1991, writ denied). Service of process with one cause number will not support a suit with a different cause number. See, e.g., *Finlay v. Jones*, 435 S.W.2d 136, 137 (Tex.1968) (D was served under cause number 144,608 instead of 144,607).

§2.3 Information about court. The citation must contain the following information about the court:

1. Identification of court. The citation must contain the name and location of the court and the address of the clerk who issued the citation. TRCP 99(b)(3), (11).

2. Signature & seal. The citation must be signed by the clerk and issued under the seal of the court. TRCP 15, 99(b)(2); *Verlander Enters. v. Graham*, 932 S.W.2d 259, 262 (Tex.App.—El Paso 1996, no writ).

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

ROBERT D. BRADSHAW,

Plaintiff,

vs.

COMMONWEALTH OF THE NORTHERN  
MARIANA ISLANDS, et al.,

Defendants.

Case No. CV05-84-N-EJL

MEMORANDUM ORDER

Pending before the Court in the above-entitled matter are Defendants' motions to dismiss for lack of jurisdiction (Docket Nos. 21, 26, and 29) as well as Plaintiff's motions to seal and strike (Docket Nos. 33 and 36) and Plaintiff's motion to extend the service time and allow service by publication (Docket No. 51). Defendants' move to dismiss case for lack of personal jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(2) and in the alternative for improper venue and insufficiency of service of process on certain Defendants. Defendants contend this Court is without personal jurisdiction over them as Defendants have insufficient contacts with Idaho. Plaintiff argues jurisdiction is proper in Idaho and nationwide service of process is appropriate in this case.

Having fully reviewed the record, the Court finds that the facts and legal arguments are adequately presented in the briefs and record. Accordingly, in the interest of avoiding further delay, and because the Court conclusively finds that the decisional process would not be significantly aided by oral argument, this matter shall be decided on the record before this Court without oral argument.

**FACTUAL BACKGROUND**

Plaintiff Robert Bradshaw ("Bradshaw") is a former Temporary Public Auditor for the Commonwealth of Northern Mariana Islands ("CNMI"). He filed this action as a *pro se* litigant. Defendants are the CNMI, a former Acting Attorney General (Nicole Forelli) and three former

CNMI Assistant Attorneys (William Bush, L. David Sosebee, and Andrew Clayton), two CNMI Supreme Court Justices (Alexandro Castro and John Manglona), a former CNMI Superior Court Judge and Supreme Court Justice (Timothy Bellas), a private attorney from the CNMI (Jay Sorensen), and a former employee of the CNMI government (Robert Bison) who was terminated from employment by Plaintiff during Bradshaw's tenure as Temporary Public Auditor.

Plaintiff's Second Amended Complaint (Docket No. 20) asserts eighteen claims under various federal statutes including criminal statutes, the Racketeer Influenced Corrupt Organizations ("RICO") Act, the Immigration Reform and Control Act and the CNMI's Indemnification Act. Bradshaw's claims arise from a civil lawsuit by Bison against Bradshaw. Bison's attorney was Sorensen. Bradshaw claims he instructed the Attorney General's office that he had not been personally served and they should deny any attempt of service on his behalf. A default judgment was entered against Plaintiff in favor of Bison on March 10, 2000. Bradshaw maintains Sorensen fraudulently served the complaint and that the court involved in the case improperly allowed defective service of process to support the default judgment as well as improperly denied indemnification under the CNMI Indemnification Act. Plaintiff also alleges the CNMI Supreme Court improperly upheld the denial of indemnification. Bradshaw also alleges the CNMI Attorney General unlawfully failed to protect Bradshaw's interests during the Bison litigation.

Bradshaw now resides in Idaho. None of the Defendants reside in Idaho. It is not disputed that Plaintiff did not personally serve Sorensen or Bison. Instead, Plaintiff had the complaint served on Jay Sorensen's sister, Cynthia Sorensen at a residence in which neither of these Defendants were residing.

#### **BURDEN OF PROOF**

The Court's review of the motions to dismiss is undertaken with an eye on Ninth Circuit standards regarding *pro se* litigants. Tucker v. Carlson, 925 F.2d 330 (9th Cir. 1991). However, the Court reminds the Plaintiff that *pro se* litigants are held to same procedural rules as counseled litigants. King v. Atiyeh, 814 F.2d 565, 567 (9<sup>th</sup> Cir. 1987).

In a 12(b)(2) motion to dismiss the Plaintiff need only make a prima facie showing of facts supporting jurisdiction through its pleadings and affidavits to avoid dismissal. Glencore Grain

Rotterdam B.V. v. Shivnath Rai Harnarain Co., 284 F.3d 1114, 1119 (9<sup>th</sup> Cir. 2002) (citing Myers v. Bennett Law Offices, 238 F.3d 1068, 1071 (9<sup>th</sup> Cir. 2001)). The Court accepts as true Plaintiff's uncontroverted allegations, and resolves in its favor factual conflicts contained in the parties' filings. Id. Finally, if the allegations in the complaint are challenged by Defendants, the Plaintiff must prove specific facts supporting personal jurisdiction. Taylor v. Protland Paramount Corp., 383 F.2d 634, 639 (9<sup>th</sup> Cir. 1967).

### DISCUSSION

Personal jurisdiction over all parties is required before a court may decide a case in controversy. U.S. CONST. Amend. XIV. Before a court may properly exercise personal jurisdiction over a nonresident defendant it must be satisfied that two independent requirements have been met: first, that an applicable rule or statute affirmatively authorizes the assertion of personal jurisdiction over the defendant, and second, that the assertion of such jurisdiction "accords with constitutional principles of due process." Data Disc, Inc., 557 F.2d at 1285; Petrik v. Public Serv. Mut. Ins. Co., 879 F.2d 682, 684 (9<sup>th</sup> Cir. 1989). Although the two requirements are independent, they are often interrelated. For example, where federal subject matter jurisdiction is predicated on diversity, Rule 4 of the Federal Rules of Civil Procedure incorporates the state's long-arm statute as the authorizing source for service of process. In such a case, the defendant's amenability to suit in federal district court is limited by the state's rule or statute. Because a state's ability to authorize service of process is restricted by the due process clause to cases in which the defendant has certain minimum contacts with the state, a federal district court sitting in diversity will analyze the due process inquiry by assessing the defendant's contacts with the forum state. Neaves, 912 F.2d at 1065; Fields v. Sedgwick Associated Risks, Ltd., 796 F.2d 299, 301 (9<sup>th</sup> Cir. 1986).

In contrast, where the federal court's subject matter jurisdiction is predicated on a federal question and service is accomplished pursuant to a federal law authorizing nationwide or worldwide service of process, and not by reference to the state's long-arm statute, the court is no longer restricted by the due process limitations inherent to a state's authorization of service. Go-Video, Inc. v. Akai Elec. Co., Ltd., 885 F.2d 1406, 1414-15 (9<sup>th</sup> Cir. 1989); Securities Investor Protection Corp. v. Vigman, 764 F.2d 1309, 1315-16 (9<sup>th</sup> Cir. 1985). Under these circumstances, then, due



process concerns may be satisfied by a determination that the defendant has sufficient contacts with the United States as a whole. Go-Video, Inc., 885 F.2d at 1414-16; Vigman, 764 F.2d at 1315-16; Kramer Motors, Inc. v. British Leyland, Ltd., 628 F.2d 1175, 1177 (9th Cir.), cert. denied, 449 U.S. 1062 (1980).

In examining the facts of this case, the Court finds it lacks personal jurisdiction over the named Defendants regardless of the whether a state or federal statute is cited as a basis to create personal jurisdiction.

#### I. Idaho's Long Arm Statute Analysis

Two forms of personal jurisdiction exist: general and specific. Helicopteros Nacionales de Colombia v. Hall, 466 U.S. 408 (1984). In order to exercise either type of personal jurisdiction, the state long-arm statute must be satisfied. See State of Idaho v. M.A. Hanna Co., 819 F. Supp. 1464 (D. Idaho 1993). In adopting Idaho Code § 5-514, the Idaho Legislature intended to exercise all the jurisdiction available to the State of Idaho under the due process clause of the United States Constitution. Houghland Farms, Inc. v. Johnson, 803 P.2d 978, 981 (Idaho 1990); see also Lake v. Lake, 817 F.2d 1416 (9th Cir. 1987) (determining federal cases provide guidance in determining whether personal jurisdiction exists). Thus, for the long arm statute to apply, the Court need only determine whether asserting personal jurisdiction complies with due process. M.A. Hanna Co., 819 F. Supp. 1464.

##### A. General Jurisdiction

General jurisdiction allows a defendant to be haled into court in a state where the defendant's contacts with that state are "substantial" or "continuous and systematic," even if the action is unrelated to those contacts. Bancroft & Masters, Inc. v. Augusta Nat. Inc., 223 F.3d 1082, 1086 (9th Cir. 2000). The defendant's contacts must approximate physical presence in the state to meet the "fairly high" standard for establishing general jurisdiction. Id. (citing Gates Learjet Corp. v. Jensen, 743 F. 2d 1325, 1331 (9th Cir. 1984)). Factors to consider in determining general jurisdiction include: "whether the defendant makes sales, solicits or engages in business in the state, serves the state's markets, designates an agent for service of process, holds a license, or is

incorporated there.” Id. See also Hirsh v. Blue Cross, Blue Shield of Kansas City, 800 F. 2d 1474, 1478 (9<sup>th</sup> Cir. 1986).

None of the individually named Defendants has ever set foot in or transacted business in the State of Idaho. The Defendants have no direct business or governmental contact with Idaho. The Defendants do not solicit or engage in business in Idaho. Clearly, general jurisdiction is lacking as to each Defendant in this case and Plaintiff has not carried his burden to establish general jurisdiction.

#### B. Specific Jurisdiction

When a state exercises personal jurisdiction over a defendant in a suit arising out of or related to the defendant's contacts with the forum, the State is exercising "specific jurisdiction" over the defendant. Helicopteros, 466 U.S. at 414 n. 8. Specific jurisdiction exists if a defendant has sufficient “minimum contacts” with the forum such that exercise of jurisdiction would not “offend the traditional notions of fair play and substantial justice.” International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945). In the Ninth Circuit, three conditions must be met in order to establish “minimum contacts”: (1) the nonresident defendant must purposely direct its activities or consummate some transaction with the forum or a resident thereof, or perform some act by which it purposefully avails itself of the privilege of conducting activities within the forum; (2) the claim must arise or result from forum-related activities; and (3) the exercise of jurisdiction must be reasonable. Yahoo! Inc. v. La Ligue Le Racisme, 379 F.3d 1120, 1123 (9<sup>th</sup> Cir. 2004.)

##### 1. The nonresident defendant must purposefully conduct activities within the forum:

The connection between the defendant and the forum State required for a finding of minimum contacts must come about by an action of the defendant purposefully directed toward the forum State. Asahi Metal Industrial Co. v. Superior Ct., 480 U.S. 102, 112 (1987). This requirement ensures that a person is not hauled into court as the result of random, fortuitous, or attenuated contacts or on account of the unilateral activity of third parties. Burger King Corp. v. Rudzewicz, 471 U.S. 462, 475 (1985). Thus, the Court must examine whether Defendants’ activities were directed purposefully toward the forum. Id. at 476. Purposeful availment “requires

a finding that the defendant "[has] performed some type of affirmative conduct which allows or promotes the transaction of business within the forum state." Doe v. Unocal Group, 248 F.3d 915, 923 (citing Sher v. Johnson, 911 F.2d 1357, 1362 (9<sup>th</sup> Cir. 1990) (quoting Sinatra v. National Enquirer, Inc., 854 F.2d 1191, 1195 (9<sup>th</sup> Cir. 1988)). However, "an individual's contract with an out-of-state party alone [cannot] automatically establish sufficient minimum contacts' to support personal jurisdiction." Id. (citing McGlinchy v. Shell Chemical Co., 845 F.2d 802, 816 n. 9 (9<sup>th</sup> Cir. 1988) (quoting Burger King, 471 U.S. at 478)).

Incorporating the standards set forth in Burger King, the Ninth Circuit has expounded upon the requirements for purposeful availment, noting that purposeful direction of some act having effect in the forum constitutes sufficient contact to exert jurisdiction, and that a lesser showing of contacts with the forum may be sufficient if considerations of reasonableness so require. Doe, 248 F.3d at 923 (citing Haisten v. Grass Valley Medical Reimbursement Fund, LTD, 784 F.2d 1392, 1397 (9<sup>th</sup> Cir. 1986)). Thus, cases will arise in which the defendant has not purposefully directed its activities at the forum state, but has created sufficient contacts to allow the state to exercise personal jurisdiction where reasonable. Brand v. Menlove Dodge, 796 F.2d 1070, 1074 (9<sup>th</sup> Cir. 1986).

It is undisputed that the individual Defendants do not have "minimum contacts" with the State of Idaho. Accordingly, the Court finds the named Defendants have not purposefully directed activities in Idaho. While it appears an employee of the CNMI did originally contact Bradshaw regarding employment in CNMI, that person is not a party to this lawsuit and such limited contact with Idaho does not confer specific jurisdiction as to the government of CNMI or other governmental employees especially since the cause of action in this case is not related to the initial contact regarding Bradshaw's employment.

2. The claim must arise out of or result from Defendant's forum-related activities:

The plaintiff's claims must arise out of the defendants' forum related activities. In making this determination, the Ninth Circuit has adopted a "but for" analysis. See Ballard v. Savage, 65

F.3d 1495, 1500 (citing Shute v. Carnival Cruise Lines, 897 F.2d 377, 381 (9<sup>th</sup> Cir. 1990), *rev'd on other grounds*, 499 U.S. 585 (1991)). Thus, specific personal jurisdiction is proper only where, "but for" Defendant's activities in Idaho, the Plaintiff's current alleged injuries would not have occurred. Again, it is undisputed that the current claims do not arise out of Defendants' forum related activities as the only Defendant that could be held to even have exercised Idaho activities is CNMI and this was discussed above as being insufficient to create specific jurisdiction over the named Defendants.

3. The exercise of jurisdiction must be reasonable:

The Court must also determine whether the exercise of jurisdiction is reasonable, looking at seven factors: the extent of defendant's purposeful injection into the forum state's affairs; the burden on the defendant in defending in the forum; the extent of conflict with sovereignty of the defendant's state; the interest of the forum state; the most efficient judicial resolution of the controversy; the importance of the forum to the plaintiff's interest in convenient and effective relief; and the availability of an alternative forum. Dole Food Co. v. Watts, 303 F.3d 1104, 1114 (9<sup>th</sup> Cir 2002). It is well established that in determining personal jurisdiction the court must focus primarily on "the relationship among the defendant, the forum, and the litigation." Shaffer v. Heitner, 433 U.S. 186, 204 (1977).

Based on the facts as alleged by Plaintiff, the Court finds there is nothing that can be considered "reasonable" in conferring specific jurisdiction in Idaho over these Defendants via the long-arm statute of the State of Idaho. Plaintiff argues the fact that his real property in Idaho may be subject to the default judgment entered by the court in CNMI should establish jurisdiction over the Defendants. The fact that Plaintiff resides in Idaho and may own property in Idaho establishes personal jurisdiction over Plaintiff, but it does nothing to establish personal jurisdiction over the named Defendants. The fact certain Defendants may, in the future, have contacts in Idaho does not make personal jurisdiction "reasonable" at the time the lawsuit was filed in this case.



All three of the test for specific personal jurisdiction under Idaho's long-arm statute fail when applied to the record before this Court. Accordingly, Idaho's long-arm statute has not been satisfied to confer general or specific personal jurisdiction over the Defendants in this case.

## II. Nationwide Service of Process

In the absence of authority to serve process using Idaho's long-arm statute, Plaintiff argues he may seek such authority under a federal statute. Fed. R. Civ. P. 4(k)(1)(D). However, of the several federal statutes cited by Plaintiff in his Second Amended Complaint, only the RICO Act offers a nationwide service of process provision. 18 U.S.C. § 1965(b).<sup>1</sup>

Bradshaw alleges that the Defendants (except Bison and Sorenson) are liable under RICO as they conspired to deny his civil rights and his right to indemnification. Since Sorensen and Bison are not named in the RICO Act count of the Second Amended Complaint, nationwide service of process would not apply to these two Defendants. As to the CNMI Defendants (those connected or formerly connected to or employed by the government of CNMI), the Court finds the RICO Act claim set forth in the Second Amended Complaint is insufficient to confer personal jurisdiction over the CNMI Defendants.

Rule 4(k)(2) of the Federal Rules of Civil Procedure may apply when neither general nor specific jurisdiction can be established. If the exercise of jurisdiction is consistent with the Constitution and laws of the United States, serving a summons or filing a waiver of service is also effective, with respect to claims arising under federal law, to establish personal jurisdiction over the person of any defendant who is not subject to the jurisdiction of the courts of general jurisdiction of any state. Fed. R. Civ. P. 4(k)(2). There are, however, limits on the applicability of nationwide service of process under the RICO Act.

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<sup>1</sup> 18 U.S.C. § 1965(b) provides:

In any action under section 1964, of this chapter in any district court of the United States in which it is shown that the ends of justice require that other parties residing in any other district be brought before the court, the court may cause such parties to be summoned, and process for that purpose may be served in any judicial district of the United States the marshal thereof.

Merely alleging the CNMI Defendants' actions constituted a deprivation of Plaintiff's rights as a RICO claim is not sufficient to allow nationwide service of process. Bowen v. Oistead, 125 F.3d 800, 806 (9<sup>th</sup> Cir. 1997). The Ninth Circuit has held "[f]or nationwide service to be imposed under section 1965(b), the court must have personal jurisdiction over at least one of the participants in the alleged multi district conspiracy and the plaintiff must show that there is no other district in which a court will have personal jurisdiction over all the alleged co-conspirators." Butchers Union Local No. 498 v. SDC Inv., Inc., 788 F2d 535 (9<sup>th</sup> Cir. 1986). In this case, Plaintiff has not come forward with evidence to establish personal jurisdiction over any of the alleged CNMI co-conspirators and has not shown there is no other district in which a court could have personal jurisdiction over all the alleged co-conspirators. Therefore, Plaintiff has failed to establish the CNMI Defendants are amenable to service of process under the RICO Act.

As to any other federal statute cited in the Second Amended Complaint, the Court finds the Plaintiff has not carried his burden to establish that service would satisfy the constitutional concerns of fairness or reasonableness when the alleged improper actions took place in CNMI and not in Idaho and Plaintiff is the only party in Idaho. Defendants are not amenable to service of process in the District of Idaho nor could they reasonably expect that would have to defend litigation in Idaho.

### CONCLUSION

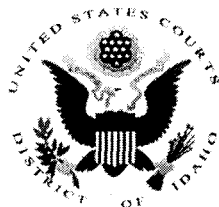
Plaintiff has not met his burden of proof to establish personal jurisdiction over the named Defendants. In examining the record in this matter, the exercise of personal jurisdiction over any of the Defendants would not be constitutional, reasonable or fair. There are no state or federal statutes that provide for the exercise of personal jurisdiction over any of the named Defendants as Plaintiff has not carried his burden to establish Idaho's long-arm statute applies or the RICO Act's nationwide service applies to confer personal jurisdiction. The other federal statutes alleged in the Second Amended Complaint do not provide for service that complies with the constitutional concerns of Fed. R. Civ. P. 4(k)(2). Having found no personal jurisdiction over any of the Defendants, the Court finds it would also be unfair and improper to allow service by publication where this Court has no personal jurisdiction over Defendants living outside the United States.

**ORDER**

Based on the foregoing, and being fully advised in the premises, IT IS HEREBY ORDERED:

- 1) Plaintiff's motion to seal (Docket No. 33) is **GRANTED**.
- 2) Plaintiff's motion to withdraw or strike his answer and rebuttal to motion for extension of time to serve response pleadings FILED ON May 12, 2005 (Docket No. 36) is **GRANTED**.
- 3) Defendants' Motions to Dismiss (Docket Nos. 21, 26, and 29) are **GRANTED** as this Court lacks personal jurisdiction over the named Defendants and the matter is **DISMISSED WITHOUT PREJUDICE**.
- 4) Plaintiff's motion to extend the time for service and to serve by publication (Docket No. 51) is **DENIED**.
- 5) Defendants' Motion to Strike (Docket No. 56) is **GRANTED** and Plaintiff's sur-reply is **STRICKEN** (Docket No. 53) as such is not provided by the Local Rules without leave of the Court.

DATED: **July 25, 2005**



A handwritten signature in cursive script, reading "Edward J. Lodge".

Honorable Edward J. Lodge  
U. S. District Judge